

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

NO. CR-97-0040 WBS

Plaintiff,

v.

LEONEL RIVERA,

ORDER

Defendant.

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Defendant Leonel Rivera, in propria persona, has filed a "petition for reconsideration of reduction [of] sentence" on the ground that his sentence was enhanced with quantities and other facts not found by the jury, citing United States v. Booker, 543 U.S. 220 (2005).

Rivera files this motion under 18 U.S.C. § 3582(c)(2), which provides, in relevant part, that:

The court may not modify a term of imprisonment once it has been imposed except that -

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment . . . if such reduction is consistent with

1 applicable policy statements issued by the Sentencing
2 Commission.

3 18 U.S.C. § 3582(c)(2). However, Rivera's motion does not point
4 to the Sentencing Commission lowering the relevant sentencing
5 range, but challenges the constitutionality of his sentence,
6 specifically that mandatory guidelines were found
7 unconstitutional and changed in the wake of the Supreme Court's
8 decisions.

9 Claims such as Rivera's, based on Booker, 543 U.S. 220,
10 and Blakley v. Washington, 542 U.S. 296 (2004), are more properly
11 construed as motions under § 2255. Wyche v. United States, 317
12 F. Supp. 2d 1, 13 (D.D.C. 2004) (Where "the petitioner
13 essentially claims that the trial court improperly based his
14 sentence on facts that the jury did not determine to be true
15 beyond a reasonable doubt . . . the more appropriate vehicle for
16 this line of attack . . . is a section 2255 motion because that
17 statute provides a mechanism for challenging an illegally imposed
18 sentence.")

19 Rivera's conviction became final on April 26, 2000,
20 when he was sentenced to a term of 360 months and fine of
21 \$20,000, plus a \$200 special penalty assessment, for conspiracy
22 and possession with intent to distribute methamphetamine. His
23 first § 2255 motion was denied on June 24, 2005.

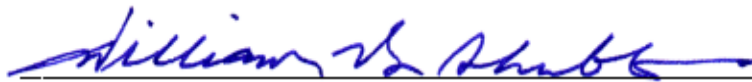
24 The filing of second and successive motions under §
25 2255 is prohibited unless the petitioner has obtained
26 certification from the Court of Appeals. 28 U.S.C. § 2244;
27 United States v. Allen, 157 F.3d 661, 664 (9th Cir. 1998).

28 The law currently in effect indicates that unless and

1 until defendant receives permission from the Ninth Circuit to
2 file a successive habeas petition, this court cannot consider
3 defendant's further arguments for relief. Cooper v. Calderon,
4 274 F.3d 1270, 1274 (9th Cir. 2001) ("The district court
5 correctly recognized that Cooper's petition was 'second or
6 successive' under Section 2244(b). Once it did so, however, it
7 lacked jurisdiction to consider the merits of his petition.").
8 Because defendant has not obtained certification to file a
9 successive motion under § 2255, this court lacks jurisdiction
10 over this motion. Thus, the court cannot grant defendant's
11 motion to correct his sentence because it is procedurally
12 barred.¹

13 IT IS THEREFORE ORDERED that defendant's motion for a
14 reduction of sentence, filed June 7, 2007, be, and the same
15 hereby is, DENIED.

16 DATED: June 19, 2007

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18 WILLIAM B. SHUBB
19 UNITED STATES DISTRICT JUDGE
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25 ¹ Further, review of Rivera's successive petition is
26 barred because the Supreme Court has not made Apprendi v. New
27 Jersey, 530 U.S. 466 (2000), Blakely, 542 U.S. 296, or Booker,
28 543 U.S. 220, retroactively applicable to cases on collateral
review, as required by 28 U.S.C. § 2244(b)(2)(A). See, e.g.,
Green v. United States, 397 F.3d 101 (2d Cir. 2005); United
States v. Anderson, 396 F.3d 1336 (11th Cir. 2005).